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MICHAEL RODAK, JR., CLER

IN THE

Supreme Court of the United States

October Term, 1972

No._____

GEORGE E. BARRETT, LIONEL R. BARRETT, JR., CARLTON H. PETWAY, RITA SANDERS GEIER and OMER GALLE, for themselves and jointly and severally for all others similarly situated,

Petitioners,

v.

ROBERT KUNZIG, as Administrator of the General Services Administration; ED JOLLY, as Area Manager, General Services Administration; HERMAN THOMPSON, as Acting Supervisor, General Services Administration; and JOHN SPRINKLE, Building Manager, General Services Administration, and all of their successors, agents, servants, employees and those persons in active concert or participation with them,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional, Statutory, and Regulatory Provisions Involved 3

Statement of The Case

The Proceedings Below 4

The Facts 5

Reasons For Granting The Writ

I. Certiorari should be granted to determine whether the Court of Appeals for the Sixth Circuit erred in creating an exception to the fourth amendment of the Constitution of the United States. The creation of such an exception is an important deviation from traditional fourth amendment principles, has not been heretofore recognized by this Court, and is in conflict with the principles of law set forth in *Adams v. Williams,* 92 S.Ct. 1921 (1972), *United States v. Bisweil,* 92 S.Ct. 1593 (1972), and *United States v. United States District Court for the Eastern District of Michigan,* 40 U.S.L.W. 4761 (U.S. June 19, 1972) 8

II. Certiorari should be granted to determine whether subjecting the briefcases and packages of all persons entering the United

Page

States Courthouse, Nashville, Tennessee, to a general search, without probable cause or a search warrant, (a) violates the right of privacy guaranteed by the first, fourth, fifth, and ninth amendments and the right of counsel and the right to a public trial guaranteed by the sixth amendment, and (b) conditions the exercise of those rights on the relinquishment of fourth amendment rights in direct violation of principles enunciated in *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Speiser v. Randall*, 351 U.S. 513 (1958) ..15

III. Certiorari should be granted to determine whether the Court of Appeals erred in affirming the district court's holding that no class action was presented as to spectators or litigants ..20

Conclusion ..23

APPENDIX

Opinion of the United States District Court for the Middle District of Tennessee, Nashville Division.... 1a

Opinion of the Court of Appeals for the Sixth Circuit, *Barrett v. Kunzig* ..18a

Opinion of the Court of Appeals for the Sixth Circuit, *Downing v. Kunzig* ..20a

Constitution of the United States First Amendment ..27a

TABLE OF CONTENTS—continued

Page

Fourth Amendment 27a

Fifth Amendment 27a

Sixth Amendment 28a

Ninth Amendment 28a

Rule 23, Federal Rules of Civil Procedure 28a

41 C.F.R. 101-19.3, (5) and (14) [now 41 C.F.R. § 101-303 and 101-311] 29a

Plaintiffs' exhibit No. 3 (in pertinent part) 30a

TABLE OF AUTHORITIES

Cases:

Adams v. Williams, 92 S.Ct. 1921 (1972) 9, 13, 14

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) 19

Bailey v. Patterson, 206 F. Supp. 67 (D. Miss. 1962), rev'd, 323 F.2d 201 (5th Cir. 1963), *cert. denied,* City of Jackson v. Bailey, 376 U.S. 910 (1964) 22

Barrett v. Kunzig, 331 F. Supp. 266 (M.D.Tenn. 1971) affirmed ....F.2d.... (6th Cir. 1972) 10, 19

Boddie v. Connecticut, 401 U.S. 371 (1971) 13, 19

Boyd v. United States, 116 U.S. 616 (1886) 16

Camara v. Municipal Court, 387 U.S. 523 (1967) 9

TABLE OF AUTHORITIES—continued

Page

Carroll v. United States, 267 U.S. 132 (1925) 10

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) 9

Chimel v. California, 395 U.S. 752 (1969) 10, 11

City of Jackson v. Bailey, 376 U.S. 910 (1964) 22

Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972) 10, 13, 19

Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) 20, 21

Eisenstadt v. Biard, 92 S.Ct. 1029 (1972) 16

Estes v. Texas, 381 U.S. 532 (1965) 18

Goldberg v. Kelly, 397 U.S. 254 (1970) 16, 20

Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 359 U.S. 977 21

Griswold v. Connecticut, 381 U.S. 479 (1956) 16

In re Oliver, 333 U.S. 257 (1948) 18

Johnson v. Zerbst, 304 U.S. 458 (1938) 17

Katz v. United States, 389 U.S. 347 (1967) 11

Lindsey v. United States, 451 F.2d 701 (3d Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) 14

Lloyd Corporation Ltd. v. Tanner, 40 U.S.L.W. 4829 (U.S. 1972) 19

Mapp v. Ohio, 367 U.S. 634 (1961) 16

TABLE OF AUTHORITIES—continued

Page

Marsh v. Alabama, 326 U.S. 501 (1946) 19, 20

McDonald v. United States, 335 U.S. 451 (1948) 10, 16

New York Times Company v. United States, 403 U.S. 713 (1971) 13

Schmerber v. California, 384 U.S. 757 (1966) 16

See v. City of Seattle, 387 U.S. 541 (1967) 9

Shadwick v. City of Tampa, 40 U.S.L.W. 4758 (U.S. June 19, 1972) 15

Sherbert v. Verner, 374 U.S. 398 (1963) 16, 20

Speiser v. Randall, 351 U.S. 513 (1958) 16, 20

Terry v. Ohio, 392 U.S. 1 (1968) 10, 13, 14, 15

United States v. Bell, 335 F. Supp. 797 (E.D.N.Y. 1971) 14

United States v. Biswell, 92 S.Ct. 1593 (1972) 9, 11, 12, 13

United States v. Epperson, 454 F.2d 769 (4th Cir. 1972) 13, 14

United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971) 14, 18

United States v. Robel, 389 U.S. 258 (1967) 12

United States v. United States District Court for the Eastern District of Michigan, 40 U.S.L.W. 4761 (U.S. 1972) 9, 10, 11, 13, 15

TABLE OF AUTHORITIES—continued

Page

Constitution of the United States:

First Amendment 3, 15, 16

Fourth Amendment ..... passim

Fifth Amendment 3, 15, 16

Sixth Amendment 3, 15, 17, 18

Ninth Amendment 3, 15, 16

Statutes:

28 U.S.C. § 1254(1) 2

40 U.S.C. §§ 318a, 318b and 318d 4, 12

Federal Rules of Civil Procedure:

Rule 23 ..... 3, 22, 23

Rule 65(a)(2) 5

Regulations:

41 C.F.R. 101-19.303 and 101-19.311 [former 101-19-3(5) and (14)] 3

Other Authorities:

Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433 (1960) 21

Advisory Committee, Federal Rules of Civil Procedure, Note, 39 F.R.D. 98 22

Statistical Abstract of the United States, 1971, U.S. Dept. of Commerce, Bureau of the Census 19

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Tennessee, Nashville Division, is re-

ported at 331 F. Supp. 266. The opinion of the United States Court of Appeals for the Sixth Circuit is as yet unreported. Copies of the opinions are appended at la and 18a respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1972, and a timely petition for rehearing and suggestion for rehearing in banc was denied on April 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in creating a novel, general inspection exception to the fourth amendment of the Constitution of the United States, when the record shows that the General Services Administration inspection policy in question is justified by only vague fears as opposed to specific facts, when the policy is arbitrary in conception, and when there is no evidence that a probable cause or warrant requirement would frustrate the purpose purportedly served by the inspection policy.

II. Whether subjecting the briefcases and packages of all persons entering the United States Courthouse, Nashville, Tennessee, to a general search by the General Services Administration without probable cause or search warrant, violates basic constitutional rights:

A. The right of every person to be free from unreasonable searches and seizures, which is guaranteed by the fourth amendment;

B. The right of privacy guaranteed by the first, fourth, fifth, and ninth amendments;

C. The right of counsel guaranteed in the sixth amendment; and

D. The right to public trials provided for in the sixth amendment.

III. Whether the right to counsel, the right to a public trial, and access to government may be conditioned on the relinquishment of rights guaranteed by the fourth amendment.

IV. Whether the Court of Appeals erred in affirming the district court's holding that "the United States Government and its custodian, General Services Administration, could make use of its property as could any private citizen with his home," and therefore "could prevent entry or make such conditions as it deemed proper as a precedent to entry."

V. Whether the Court of Appeals erred in affirming the holding of the district court that no class action was presented as to spectators or litigants.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the first, fourth, fifth, sixth, and ninth amendments of the Constitution of the United States and Rule 23 of the Federal Rules Civil Procedure. Also involved are regulations of the General Services Administration, (G.S.A.) 41 C.F.R. 101-19.3, *et seq.*, and a G.S.A. policy effective June 15, 1971.

These constitutional, statutory, and regulatory provisions are printed in the Appendix, *infra*, at 27a.

In addition, the following portions of 40 U.S.C. §§ 318a and 318b are relevant:

> §318a.
>
> The Administrator of General Services or officials of the General Services Administration duly authorized by him are authorized to make all needful rules and regulations for the government of the Federal property under their charge and control. . . .
>
> §318b.
>
> Upon the application of the head of any department or agency of the United States having property of the United States under its administration and control and over which the United States has acquired exclusive or concurrent criminal jurisdiction, the Administrator of General Services or officials of the Administration duly authorized by him are authorized to detail any such special policemen for the protection of such property. . . .

STATEMENT OF THE CASE

a. *The Proceedings Below*

This is a class action for declaratory and injunctive relief. The jurisdiction of the district court was invoked to consider questions involving the rights of attorneys, parties to lawsuits and the general public to enter the United States Courthouse in Nashville, Tennessee, without relinquishing the right to be free of unreasonable searches and seizures.

The complaint and motions for a temporary restraining order and preliminary injunction were filed in the United States District Court for the Middle District of Tennessee, Nashville Division, on June 15, 1971. The motion for a temporary restraining order was denied

on June 15, 1971. A hearing on the motion for preliminary injunction, which was consolidated with the trial on the merits, under Rule 65(a)(2) of the Federal Rules of Civil Procedure, was held on June 18 and 21, 1971.

On June 21, 1971, an order was filed allowing Larimore Burton, Jr., an attorney, to intervene as a party plaintiff. On July 8, 1971, the Tennessee Bar Association filed an application to intervene as a party plaintiff. On July 16, 1971, the application was granted. A memorandum opinion was entered denying the request for injunction and dismissing the case on August 11, 1971.

On August 19, 1971, Larimore Burton, Jr., filed notice of appeal. On August 23, 1971, the Tennessee Bar Association filed notice of appeal. On September 24, 1971, a motion of the Bar Association withdrawing its notice of appeal was granted. On October 4, 1971 petitioners herein filed notice of appeal.

The United States Court of Appeals for the Sixth Circuit affirmed the order of the lower court on February 22, 1972. The court was "of the view that the security precautions promulgated by G.S.A. . . . were reasonable." A timely petition for rehearing was denied on April 14, 1972.

b. *The Facts*

On May 27, 1971, a letter was sent to "Heads of Tenant Agencies, U.S. Courthouse, Nashville, Tennessee," advising that as of June 15, 1971, all persons entering the United States Courthouse carrying "briefcases, packages, etc.," would be required to submit those

packages to an inspection unless such persons had identification cards.[1]

On June 15, 1971, petitioners Barrett[2] and Galle attempted to enter the United States Courthouse, at which time Barrett was stopped by Mr. Terry Stone, an employee of G.S.A., and asked to open his briefcase. Barrett declined to do so, informing Stone that he was a lawyer.

Upon Barrett's refusal to submit his briefcase for inspection, Stone told him that he could go into the building but that he would be accompanied by a guard. Barrett objected that he "did not feel that [he] could carry on [his] profession being followed by an agent of the United States Government," (T.6) and was then told that he could go into the building provided he leave his briefcase at the inspection desk. Barrett asked Stone if he had a search warrant, or if he had reasonable cause to believe that Barrett was carrying anything in the briefcase that was either detrimental to the life of anyone in the building or to the property. Stone said "No." (T. 14)

Finally, Barrett, feeling "compelled to appear in Court," (T. 8) decided to leave his briefcase at the

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[1]The letter was sent pursuant to instructions from the regional G.S.A. office in Atlanta, Georgia. (T.104). [All references to the transcript of the hearing before the district court are designated "T."]

[2]George Barrett, an attorney, was appointed on April 9, 1971, to represent Mr. Jones in *United States of America v. Richard Jones a/k/a Richard Braden*, No. 14661, United States District Court, Middle District, Tennessee. A hearing on motions filed by Mr. Jones was scheduled for June 15, 1971 at 9:00 a.m. in the United States Courthouse.

desk, explaining that in his opinion the absence of the papers in the briefcase jeopardized the defense of his client and that he was not waiving any of his rights. Petitioner Galle, who likewise had with him a briefcase, was denied entrance into the Courthouse for not opening his briefcase. (T. 12)

During the hearing on June 18, 1971, Mr. Davis Carr, an attorney, testified that on June 15, 1971, he was carrying "a folder with some files in it." The folder measured 10 inches wide, 6 inches high and less than an inch thick. As he attempted to enter the Courthouse a guard stepped in front of him. Mr. Carr held the folder up and opened it so the guard could look inside, and the guard reached over, opened the folders and thumbed through a few papers. (T. 32-33)

Mr. Larimore Burton, Jr., testified that on June 15, 1971, he attempted to enter the Courthouse to attend an arraignment. He was carrying, at the time, a little envelope briefcase, large enough to hold two or three legal files. The guard told Mr. Burton to open the case so he could examine it, Burton refused, and, in order to attend the arraignment, Burton was forced to leave his briefcase with the guard. (T. 47-49)

When Mr. Joseph Sullivan, the branch chief of the Federal Protective Service in Region 4, Atlanta, Georgia, was asked how many bomb threats had been made to Federal Courthouse buildings, he responded "I don't know," or "I can't recall." (T. 69) He did testify that there was "a problem with people who are setting explosives in our buildings." (T. 74) Although Sullivan had regional and nationwide figures with regard to the "problem," he did not have any for the United States

Courthouse in Nashville.[1] (T. 74) When asked if he knew what the specific circumstances were that led to the policy of inspections in the Nashville Courthouse, Sullivan replied "I don't recall." (T. 76) He testified that the inspection policy was made at the "central office level" in Washington, D. C. (T. 79)

There were no Federal Protective Officers across the street from the Courthouse in the Federal Office Building called the "Custom House." (T. 112) Ladies' handbags were not inspected. For instance, Mrs. Delores Gordon testified that on four different occasions when she entered the Courthouse she was carrying her pocketbook, 12¼ inches high, 15-16 inches wide, and about 3¾ inches thick, and no one asked her to open it. (T. 35-36) Mrs. Drew Smith testified that on three different occasions during the week of June 15, 1971, she entered the Courthouse carrying a bag, about 13 inches high, 14 inches across and the thickness "at least 4 inches to start with. When I get it loaded, it's about six." At no time was she stopped and asked to have her bag inspected. (T. 38-39)

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted to determine whether the Court of Appeals for the Sixth Circuit erred in creating an exception to the fourth amendment of the Constitution of the United States. The creation of such an exception is an important deviation

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[1]Later, testimony was given that there had been three bomb threats to the courthouse in the past year. None of the threats caused the officials to evacuate the building. During 1970, two bomb threats were received and in 1969 none were received. (T. 110-111)

from traditional fourth amendment principles, has not been heretofore recognized by this Court, and is in conflict with the principles of law set forth in *Adams v. Williams*, 92 S.Ct. 1921 (1972), *United States v. Biswell*, 92 S.Ct. 1593 (1972), and *United States v. United States District Court for the Eastern District of Michigan*, 40 U.S.L.W. 4761 (U.S. June 19, 1972).

The inspection of all packages and briefcases carried into a courthouse is a "search" under the fourth amendment. This Court has consistently adhered to the view that an administrative inspection is a search. For instance, in *Camara v. Municipal Court*, 387 U.S. 523 (1967), an ordinance gave city employees the right to enter and make inspections of any building or structure to perform any duty imposed upon them by the municipal code. The Court barred the prosecution of an individual who was arrested for refusing to permit a lawful inspection holding that

> such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . . *Camara v. Municipal Court, supra*, 387 U.S. at 534.

See also *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *See v. City of Seattle*, 387 U.S. 541 (1967), which reaffirm the principle that administrative inspections are searches as defined in the fourth amendment.

The crux of the issue is not whether general inspections of all briefcases and packages brought to a courthouse are searches, but whether, given the fact that a

search is involved, an exception to the warrant requirement of the fourth amendment is justified.

As the Court noted in *United States v. United States District Court for the Eastern District of Michigan*, 40 U.S.L.W. 4761, 4768 (U.S. June 19, 1972), there are some exceptions to the warrant requirement of the fourth amendment, which are few in number and are carefully delineated.[1] The Court of Appeals for the Sixth Circuit, by its decision, has attempted to justify another exception. The Court of Appeals apparently feels that "competing values [having been] weighed and a balance struck," the briefcase " 'searches' (if they may be so characterized)"[2] are not unreasonable, and that "in times of emergency government may take reasonable steps to assure that its property and personnel are protected." *Downing v. Kunzig*, 454 F.2d 1230, 1233 (6th Cir. 1972).[3]

If the Court of Appeals has evaluated the constitutionality of briefcase and package inspections by reference only to a general reasonableness standard, it has erred. This Court has already rejected such a test, for "[u]nder such an unconfined analysis, Fourth Amendment protection . . . would approach the evaporation

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[1]See, e..g., Chimel v. California, 395 U.S. 752 (1969); Terry v. Ohio, 392 U.S. 1 (1968); McDonald v. United States, 335 U.S. 451 (1948); Carroll v. United States, 267 U.S. 132 (1925).

[2]The Court of Appeals consistently speaks of "searches," as if it were not quite convinced that the practice in question is, under this Court's standards, truly a search.

[3]In upholding the lower Court's decision in Barrett v. Kunzig, the Court of Appeals merely affirmed on the basis of its recent holding in *Downing*. The language in *Downing* is, therefore, the only indication given of the Court of Appeals' reasoning. See the opinion in *Downing*, appended at 20a.

point." *Chimel v. California,* 395 U.S. 752, 764-765 (1969). Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable, *Katz v. United States,* 389 U.S. 347, 357 (1967), for

> Though the Fourth Amendment speaks broadly of "unreasonable searches and seizures," the definition of "reasonableness" turns, at least in part, on the more specific commands of the warrant clause. . . . The warrant clause of the Fourth Amendment is not dead. *United States v. United States District Court for the Eastern District of Michigan, supra,* 40 U.S.L.W. at 4767.

Assuming that a legitimate need of Government to protect its property and buildings requires the use of briefcase inspections, the question is whether the rights and needs of citizens may not be better protected by requiring a warrant before such inspection is undertaken and whether a warrant requirement would unduly frustrate the efforts of Government to protect itself. *Cf. United States v. United States District Court for the Eastern District of Michigan, supra,* 40 U.S.L.W. at 4766-4767.

In *United States v. Biswell,* 92 S.Ct. 1593 (1972), this Court in fact found a warrantless inspection procedure, authorized by the Gun Control Act of 1968, 18 U.S.C. § 921, *et seq.*, to be constitutional. It did so only because effective regulation of firearms would be easily frustrated if a warrant were always required, and because the inspections posed only limited threats to a gun dealer's justifiable expectations of privacy.[1] The Court stated that:

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[1]When a dealer chooses to engage in this pervasively regulated business and to accept a federal license he does so with the

> [W]here, as here, *regulatory* inspections further urgent federal interest and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant *where specifically authorized by statute. United States v. Biswell, supra,* 92 S.Ct. at 1597. [Emphasis added.]

The limited circumstances present in *Biswell* are not present here. There is no authorizing statute for a warrantless search,[1] and there is no licensing scheme which

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knowledge that his business records, firearms and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances which describe his obligations and define the inspector's authority. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task. United States v. Biswell, *supra,* 92 S.Ct. at 1596.

[1]40 U.S.C. §§318a and 318b, which grant the G.S.A. general power to make regulations governing the use of buildings, do not constitute congressional authorization to limit fourth amendment guarantees. For instance, in United States v. Robel, 389 U.S. 258 (1967), this Court was urged to accept the proposition that, because one portion of the Constitution granted war powers to Congress and the executive, those branches of government could fire an employee at a defense plant because he was a member of the Communist Party. Rejecting the argument, the Court reminded the government that

> [T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' United States v. Robel, *supra,* 389 U.S. at 263-64.

Congress has granted G.S.A. officials power to make arrests without warrants under limited circumstances, but has expressed no intent to grant an exception to the warrant requirements of the fourth amendment. 40 U.S.C. §318d.

gives an individual a choice[1] of undertaking a profession which is difficult to regulate and in which the individual has only a limited justifiable expectation of privacy.

The briefcase inspections undertaken in Nashville do not fall within the *Biswell* exception to the warrant requirement, nor do they fall within any other exception.[2] Even the lenient search standards described in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Adams v. Williams*, 92 S.Ct. 1921 (1972), proscribe general searches of the

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[1]The courthouse in Nashville is open to the public so that the public may have access to courts, senators, and administrative agencies of the government. Access to these governmental entities is essential if an individual is to have a voice either in the affairs of government or in government-related business which can be conducted only at the courthouse. Lawyers or parties to lawsuits who are denied entry to the Nashville courthouse are "faced with exclusion from the only forum effectively empowered to settle their disputes." *Cf.* Boddie v. Connecticut, 401 U.S. 371 (1971). As this Court has noted, there are times when the government has such a monopoly on certain activities that a denial of access to the government amounts to a denial of due process. Boddie v. Connecticut, *supra.* An individual has no "choice" when he is asked to decide whether to forfeit his right not to be subjected to a warrantless search without probable cause or to forfeit his right to access to the government and courts.

[2]See note 1, *supra,* at p. 10 for examples of exceptions to the warrant requirement. This Court has expressly rejected an exception in the area of domestic security. United States v. United States District Court for the Eastern District of Michigan, *supra. Cf.* New York Times Company v. United States, 401 U.S. 713 (1971). And, although one court has suggested that there may be an exception in "exigent national circumstances," United States v. Epperson, 454 F.2d 769 (4th Cir. 1972), the three bomb threats, which did not sufficiently excite Nashville G.S.A. employees to require building evacuation, hardly correspond to the exigent circumstances described in *Epperson,* despite the allusion made by the Court of Appeals to "ruthless forces." Downing v. Kunzig, *supra,* 454 F.2d at 1233.

type undertaken by the General Services Administration. In *Terry* and *Adams*, recognition was given to a police officer's need to make, at times, limited, self-protective searches for weapons without first obtaining a warrant. But both *Terry* and *Adams* insist, as a prerequisite to that limited search, that there be suspicious behavior, known to someone, which justifies the policeman in making a reasonable investigatory stop. See *Adams v. Williams, supra,* 92 S.Ct. at 1923.[1]

The demand for justification by specific facts is the "central teaching of this Court's Fourth Amendment jurisprudence." *Terry v. Ohio, supra,* 392 U.S. at 22, n.18. Yet when respondents were asked to justify the inspection policy by specific facts, the response was "I don't know," or "I don't recall."[2]

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[1]Airport security personnel have been permitted to make limited searches under a relaxed fourth amendment standard. Even those individuals, however, in a situation somewhat analogous to that of the G.S.A. security guard at the courthouse, must be prompted to search by some unusual occurrence. *Cf.* Lindsey v. United States, 451 F.2d 701 (3d Cir. 1971), *cert. denied,* 405 U.S. 995 (1972); United States v. Bell, 335 F.Supp. 797 (E.D.N.Y. 1971); United States v. Lopez, 328 F.Supp. 1077 (E.D.N.Y. 1971). But see United States v. Epperson, *supra.*

[2]Specific facts justifying the G.S.A. inspection policy are not present in this case. A reading of the record reveals the blatant arbitrariness and unreasonableness of the policy. For example, women's handbags, regardless of size, were not inspected. As the Tennessee Bar Association stated:

> The ironic thing about this procedure is that it cannot accomplish what it seeks to accomplish. A weapon, such as a gun or a knife, can easily be hidden in clothing on the person, and therefore would not be discovered by the officers. A person desiring to blow up the building with a bomb would only need to refuse to allow his parcel or briefcase to be opened, and the package con-

This Court should grant certiorari so that, if the fourth amendment in fact does permit general searches of all briefcases and packages carried into federal buildings, without judicial supervision,[1] and a security guard is in fact not required to have even an "inarticulate hunch"[2] of danger before forcing a person to choose between forfeiting the right to approach the offices of his government and forfeiting fourth amendment guarantees, a definite and limited exception to the fourth amendment, which will as fully as possible protect the rights of private citizens, can be formulated.

II. Certiorari should be granted to determine whether subjecting the briefcases and packages of all persons entering the United States Courthouse, Nashville, Tennessee, to a general search, without probable cause or a search warrant, (a) violates the right of privacy guaranteed by the first, fourth, fifth, and ninth amendments and the right of counsel and the right to a public trial guaranteed by the sixth amendment, and (b) conditions the exercise of those rights

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taining the bomb would be kept at the officer's desk in the lobby until it exploded.

It is submitted that any person intent upon bringing about this kind of destruction would not be deterred in the least by the procedures adopted by the defendants. The search procedures in question are therefore unnecessary, necessarily unsuccessful in accomplishing the desired end, and should be ordered by this Court to cease. Brief of Tennessee Bar Association pp. 7, 8.

[1]The importance of neutral, detached supervision of searches has been underscored in United States v. United States District Court, Eastern District of Michigan, *supra*, and Shadwick v. City of Tampa, 40 U.S.L.W. 4758 (U.S. June 19, 1972).

[2]Such a hunch was insufficient justification for the search in Terry v. Ohio, 392 U.S. *supra* at 21-22.

on the relinquishment of fourth amendment rights in direct violation of principles enunciated in *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Speiser v. Randall*, 351 U.S. 513 (1958).

A. The Nashville inspection policy instituted by G.S.A. violates appellants' right of privacy. The governing principle that any invasion of privacy is subject to constitutional protection was clearly stated as long ago as *Boyd v. United States*, 116 U.S. 616, 630 (1886):

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .

See also *Schmerber v. California*, 384 U.S. 757, 767 (1966), *Mapp v. Ohio*, 367 U.S. 634, 656 (1961) and *McDonald v. United States*, 335 U.S. 451, 453 (1948). In *Griswold v. Connecticut*, 381 U.S. 479 (1965), privacy was viewed as a self-contained right not dependent upon any single clause or amendment in the Constitution, but rather on a "penumbra" of freedoms and rights surrounding the first, fourth, fifth and ninth amendments. See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

G.S.A.'s inspection policy also interferes with the attorney-client relationship and the right to counsel.

When the attorney's briefcase is opened and inspected,

the delicate attorney-client relationship must suffer. As the Tennessee Bar Association stated:

> When a lawyer is required to open his briefcase to inspection by an officer of government, whether that officer or government be friendly or hostile, there takes place an intrusion into the confidential relationship between attorney and client. This intrusion is even more significant when, as will often be the case in the Federal Courthouse, the government itself is the opposing litigant or prosecutor of the particular client. In such a case it does not really matter that the government agent claims that he does not read or closely examine the confidential papers he searches; the offensiveness of the intrusion is based upon the fact that the government agent has the opportunity to read and examine confidential papers. Brief of Tennessee Bar Association, p. 2.

In *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) this Court reaffirmed the principle that in federal criminal proceedings the accused has the right to counsel. The Tennessee Bar Association, recognizing the interference with the right to counsel under the sixth amendment, said:

> Any procedure which forces upon attorneys the burden of enduring a search of their briefcases before arriving at a courtroom, is an interference with the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. This interference is all the more severe when it is caused by the very government which may be prosecuting the client claiming the right.
>
> . . . It is ludicrous for the court to appoint counsel for an indigent defendant, entrust him with that defendant's very life and future, and then show such a lack of trust in that attorney as to require his

> briefcase to be searched before he is allowed to enter the courtroom to represent his client. Brief of Tennessee Bar Association, p. 5.

G.S.A.'s inspection policy also infringes on the right to a public trial, which is one of the cornerstones of our legal system. The accused has a right to have a public trial[1] and the "public has an independent right to be present to see that justice is fairly done".[2] This Court has stated:

> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . .
>
> And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present. *In Re Oliver*, 333 U.S. 257, 270-272 (1948).

As a result of G.S.A.'s inspection policy, however, the right to a public trial has been tampered with.

B. The G.S.A. policy unconstitutionally conditions the sixth amendment right to counsel on the giving up of another constitutional right—the fourth amendment right to be free from submitting to unreasonable searches and seizures. In addition, the right to have a friend,

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[1]"We start with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the 'accused'. The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned." Estes v. Texas, 381 U.S. 532, 538-39 (1965).

[2]United States v. Lopez, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971).

relative and even counsel present has been unconstitutionally conditioned on their willingness to give up fourth amendment rights.

Contrary to the district court's opinion, the United States government is not permitted to act as a private owner with respect to its buildings.[1] "Ownership does not always mean absolute dominion," *Marsh v. Alabama*, 326 U.S. 501, 506 (1946), even when private property is involved. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). Particularly when the governmental property in question is the only place at which certain government-related activities can occur, *cf. Boddie v. Connecticut*, 401 U.S. (1971), and *Lloyd Corporation Ltd. v. Tanner*, 40 U.S.L.W. 4829, 4833 (U.S. 1972), the government cannot enforce unconstitutional restrictions on access.[2]

> Title to property as defined by state law controls property relations; it cannot control issues of civil liberties which arise precisely because a company

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[1]The district court, affirmed by the Court of Appeals, held that "the United States Government and its custodian, General Services Administration, could make use of its property as could any private citizen with his home," and "could prevent entry or make such conditions as it deemed proper as a precedent to entry." Barrett v. Kunzig, *infra*, at 11a.

[2]If the government may do with its land as it pleases, it could arbitrarily deny access to 33.5 percent of the total land acreage encompassing these United States or to 410,587 federally-owned buildings. If state, county, and municipal lands are included, then government has arbitrary control over approximately 40 percent of the land in the United States STATISTICAL ABSTRACT OF THE UNITED STATES, 1971. U.S. Department of Commerce: Bureau of the Census, 189-190. The percentage given excludes trust lands which are held by Indian Tribes, among others. *See id.*, at 190. It also excludes the enormous amount of land leased by the federal government. *See id.* at 191.

> town is a town as well as a congeries of property relations. And similarly the technical distinctions on which a finding of "trespass" so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution. *Marsh v. State of Alabama, supra,* 326 U.S. at 511 (Frankfurter, J., concurring).

Speiser v. Randall, 351 U.S. 513 (1958), *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Goldberg v. Kelly,* 397 U.S. 254 (1970) all hold that government may not condition the grant of a privilege where the condition precedent is the relinquishment of constitutional rights. Certiorari should be granted to reaffirm the right of an individual to privacy, counsel, and a public trial, and to make clear that the exercise of these fundamental rights, and access to the forums of government, cannot be conditioned on the willingness of the public, attorneys, or litigants to relinquish fourth amendment rights.

III. Certiorari should be granted to determine whether the Court of Appeals erred in affirming the district court's holding that no class action was presented as to spectators or litigants.

The district court, in dismissing the class of "spectators" and "litigants," held that the plaintiff spectator and plaintiff litigant did not fairly and adequately protect the interest of all spectators and litigants. This was error.

"The representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate." *Eisen v. Carlisle & Jacquelin,* 391 F. 2d 555, 563 (2nd Cir. 1968).

Nor should the adequacy of representation be challenged on quantitative grounds.

> If class suits could only be maintained in instances where all or a majority of the class appeared, the usefulness of the procedure would be severely curtailed . . . Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation, and that the dismissal *in limine* of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself. . . .
>
> *If we have to rely on one litigant to assert the rights of a large class then rely we must. Id.* at 563. [The court allowed a single plaintiff to represent a class consisting of an estimated 3,750,000 members.] [Emphasis added].

See also, *Green v. Wolf Corp.*, 406 F. 2d 291 (2nd Cir. 1968), *cert. denied*, 395 U.S. 977.

It is not necessary that absolutely all of the members of a class be ready to enforce their rights in order for a class action to be appropriate.

> A class action should not be denied merely because every member of a class might not be enthusiastic about enforcing his rights. . . . The court need concern itself only with whether those members who are parties are interested enough to be forceful advocates and with whether there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice. Weinstein, Revision of Procedure: Some Problems in Class Actions, 1960, 9 Buffalo L. Rev. 433, 460.

See also, *Eisen v. Carlisle & Jacquelin*, 391 F. 2d *supra*, at 563, n. 7.

In one case in which a district court disallowed a class action because the plaintiffs "proved no authority to represent any other person and admitted [that] other Negroes did not approve of this action," *Bailey v. Patterson*, 206 F. Supp. 67, 69 (D. Miss. 1962), the court of appeals reversed. *Id.*, 323 F. 2d 201 (5th Cir. 1963), *cert. denied, City of Jackson v. Bailey*, 376 U.S. 910 (1964).

The Advisory Committee for the Federal Rules of Civil Procedure characterizes subdivision (b)(2) of Rule 23 as follows:

> "This subdivision [(b)(2)] is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." Advisory Committee Note, 39 F. R. D. 98, 102.

Here the class of attorneys, parties to lawsuits and the general public desiring to enter the United States Courthouse is seeking final declaratory and injunctive relief for the allegedly unconstitutional violation of their rights by the appellees, thereby "settling the legality of the behavior with respect to the class as a whole." Additionally the class is necessary to avoid the possibility of adverse effects or inconsistent results on absent members of the class under (b) (1). The adoption of the class serves the interests of all concerned. If G.S.A.'s policy is declared unconstitutional, it must apply to all those affected. Certiorari should be granted to correct the denial of class representation which is in clear conflict with Rule 23 standards, as well as the decisions of other federal courts.

CONCLUSION

For the above reasons, petitioners respectfully request that the writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

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v.

ROBERT KUNZIG, as Administrator, General Services Administration, et al.

Civ. A. No. 6193.

United States District Court,
M. D. Tennessee,
Nashville Division.

Aug. 11, 1971.

MEMORANDUM OPINION

MORTON, District Judge.

This is a suit to enjoin the continued execution of a system of inspection of packages and briefcases carried into the United States Courthouse at Nashville, Tennessee by the security force of General Services Administration.

The original plaintiffs consisted of attorneys, a client, and a spectator. The Tennessee Bar Association was permitted to intervene as a plaintiff. The plaintiffs assert that the action, in addition to asserting their individual rights, is brought under Rule 23 of the Federal Rules of Civil Procedure as a class action representing: (1) attorneys who practice in the United States Courthouse, (2) attorneys who are members of the Tennessee Bar Association, (3) persons who are presently litigants in suits in the U. S. District Court at Nashville, and (4) persons who desire to attend trials as spectators.

As to proposed spectators at trials in the United States Courthouse, the Court does not find that the

plaintiff spectator in this case will fairly and adequately protect the interest of all spectators. In addition, the plaintiff has not shown a need for the existence of a class of spectators as distinguished from any person entering the building in order to use its facilities.

As to the Tennessee Bar Association, membership in that organization does not automatically qualify the attorney to practice in the federal courts of the Middle District of Tennessee. Certain procedures, not formalities, are conditions precedent to admission to practice in said U. S. District Court. Therefore, the Court finds that the Tennessee Bar Association and its members are not proper parties to this cause, and are not representative parties of any class or subclass material to the litigation.

Thus, the Court dismisses this cause as to said plaintiff Tennessee Bar Association, and also determines that there is no spectator class. In addition, this Court is not required to pass on the issue of whether the individual spectator has standing to sue, since such determination is preempted by the Court's decision on the merits.

The attorneys who practice in the U. S. District Court for the Middle District of Tennessee are listed by name on the Bar Docket or roll of attorneys as part of the permanent court records. Their identity is readily ascertainable. The prerequisites of a class as set forth in Rule 23(a) and 23(b) (2) have, in this Court's opinion, been met. The Court determines that this action is maintainable as a class action as to such attorneys.

The persons who are litigants in the U. S. District Courts at Nashville are identifiable from the records

of the Court. However, in view of the evidence presented in this cause, the Court cannot find that the plaintiff litigant can fairly and adequately protect the interest of all litigants. Therefore, this action is not maintainable as a class action as to such litigants.

BACKGROUND

The United States Courthouse in Nashville, Tennessee, owned by the United States of America, is supervised and operated by the General Services Administration, a division of government created by Congress.

The courthouse is an eight-story structure, approximately one block long and one-half block wide, housing two senators, their staff, one congressman, his staff, two circuit judges of the Sixth Circuit Court of Appeals, their staff, two district judges, their staff, the United States Clerk's Office, the United States Attorney, his staff, the Internal Revenue Service, the Veterans Administration, the Federal Bureau of Investigation, and additional governmental agencies. In short, many hundreds of persons are housed in the building. Two district judges regularly hold court in the building.

Due to bomb threats, bombings, forced entry, and disturbances, G.S.A. decided to initiate certain protective procedures in all large government buildings under their supervision and, in particular, those housing federal courts.

Evidence was introduced in this cause as to the number of bomb threats in this general area of the country and the number of forcible entries. In addition, evidence was received as to bombings in other areas of the country. On one occasion, the holding of court in this build-

ing was suspended because an unruly crowd congregated in the hallways of the building adjacent to the courtroom, was disruptive, and refused to disburse after orders from the Court. Thus it was necessary to adjourn court.

As an indication of occurrences in this country, we quote from the case of In re Trials of Pending and Future Criminal Cases, 306 F. Supp. 333 (N.D.Ill. 1969):

"(a) On September 19, 1969 a bomb caused an explosion at the Federal Office Building in New York causing damage in excess of $500,000.

"(b) On September 26, 1969 a bomb caused an explosion at our neighboring District, The United States Courthouse and Federal Building in Milwaukee, Wisconsin, causing damage estimated at $75,000.

"(c) On September 26, 1969 a bomb caused an explosion on federal property at the National Guard Armory, Madison, Wisconsin, causing damage estimated at $25,000.

"(d) On September 25, 1969 a briefcase containing 17 sticks of dynamite and a timing device was planted in the Civic Center Building and Cook County Courthouse, Chicago, Illinois on a floor immediately below the State Supreme Court Justices' Chambers.

"(e) On October 6, 1969 an explosion occurred at the Haymarket Square statue located in Chicago, Illinois." 306 F.Supp. 333, 337.

Since the above case, a California judge was slain and the United States Capitol was bombed.

IMPLEMENTATION OF REGULATIONS

With the above background, the G.S.A. under its regulations, 41 CFR 101-19.3, et seq. (November 5, 1969) set in motion a procedure of inspection. The pertinent portions of these regulations are:

> "5. CONFORMITY WITH SIGNS AND EMERGENCY DIRECTIONS. Persons in and on property shall comply with official signs of a prohibitory or directory nature, and, during emergencies, with the direction of authorized individuals.
>
> * * * * * *
>
> "14. WEAPONS AND EXPLOSIVES. No person while on property shall carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, except for official purposes." Record, Exhibit A.

By communication with their Nashville building manager, G.S.A., effective June 15, 1971, issued instructions to its security personnel:

> "During hours when the building is open, (7 AM to 5 PM), persons entering the building with briefcases, packages, etc. will be required to show ID cards or have their packages inspected."

Two large, plainly visible signs were placed at the front and rear entrances of the building (the only means of ingress and egress available) with the following wording:

NOTICE

OPEN ALL PACKAGES,
BRIEFCASES, ETC.
FOR INSPECTION AT
INSP. STATION

An inspection station (a desk or counter arrangement) was located within the lobby and the above sign was also prominently displayed at the front of this location.

The proposal to make such inspections was given wide publicity in the local newspapers as early as June 13, 1971.

Thus alerted that the inspections would be initiated on June 15, 1971, the original plaintiffs prepared for their confrontation by typing their complaint on or before June 14, 1971. The confrontation took place at 8:55 a.m. on June 15, 1971, and this suit was filed immediately thereafter.

THE CONFRONTATION

At 8:55 a.m. on June 15, 1971, attorney George Barrett appeared at the inspection station with his briefcase. Photographers were present. On being requested to open his briefcase for a visual inspection, he refused to do so. He did not, at first, identify himself as an attorney. Later he did so. He advised the security guard that he was appearing for a defendant in a criminal case in the court of a district judge in the building at 9:00 a.m. He demanded to be able to proceed wthout any inspection of his briefcase.

The plaintiff George Barrett was given three options:

(1) open his briefcase for a visual inspection; (2) leave the briefcase in the custody of an attendant and proceed into the building; or (3) carry the briefcase with him without inspection, but be accompanied by a security guard.

Other attorneys testified as to their respective confrontations. Their testimony was largely cumulative.

The plaintiffs contend that the inspection procedures infringe their individual rights and those of their clients whom they represent in the federal district courts. These infringements allegedly arise under the First, Fourth, Fifth, Sixth, and Ninth Amendments to the United States Constitution.

THE INSPECTION PROCEDURE

Any person, including plaintiffs, who enter the United States Courthouse carrying packages or briefcases are requested to open the same for visual inspection. It is uncontroverted that the inspection is made to determine if such objects contain firearms or explosives. It is uncontroverted that the inspectors (guards) do not read the contents of the briefcases or packages. It is uncontroverted that the inspection is a cursory visual inspection. No allegation is made and no contention expressed that any packages or briefcases left in custody of the guards are opened or inspected.

The packages and briefcases of all persons who enter the building, except those who work there and have been issued special identification cards, are inspected. The briefcases of the United States Judges are regularly inspected.

The term "search" has been used by the plaintiffs. To

the extent that term is applied to more than a casual visual inspection, it has no meaning and is without foundation in this record.

DISCUSSION

The Court considers the following items to be determinative of the issues: (1) the building belongs to the United States Government; (2) the inspection is a casual visual inspection for the protection of the property of the United States of America, its employees and persons lawfully in the building; and (3) there are several reasonable alternatives available to an inspectee, the plaintiffs in this case.

The United States as a Property-owner.

Article I, Sec. 8 and Article IV, Sec. 3 of the United States Constitution clearly recognize the right of the government to own, use and control property.

The second sentence of Article IV, Sec. 3 of the United States Constitution provides:

> "The Congress shall have Power to dispose of and *make all needful rules* and regulations respecting the Territory or other property belonging to the United States; * * *." (Emphasis supplied.)

By virtue of the authority of 40 U.S.C. § 318 et seq., Congress delegated to G.S.A. the right to establish regulations governing the operation, use, maintenance and protection of the United States Courthouse at Nashville, Tennessee. This delegation by Congress has been sustained as constitutional. United States v. Cassiagnol, 420 F.2d 868 (4th Cir. 1970), cert. denied 397 U.S. 1044, 90 S.Ct 1364, 25 L.Ed.2d 654 (1970).

General Services Administration properly published its regulations and under these provisions established the presently challenged inspection procedure.

It is pertinent to note that this is not an instance of a police or governmental agent invading the home, premises or property of an individual, nor is it an instance involving the benefits of any potential evidence which might be disclosed by the cursory inspection. Further, it is essential to emphasize that this is not a "stop and frisk" on the public streets and it is not interrogating in nature nor does it occur under color of arrest attendant to the inspection.

It is necessary to determine what constitutional limitations are imposed on the United States, as a property owner, where it requires those who enter its premises to consent to a casual visual inspection of containers for weapons and explosives.

To define the rights of the United States as a property owner we look to a series of cases which are uniform in their holdings.

> "It is settled that: 'With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations.' Gibson v. Chouteau, 1871, 13 Wall. 92, 99, 80 U.S. 92, 99, 20 L.Ed. 534; cf. Utah Power & Light Co. v. United States, 1917, 243 U.S. 389, 405, 37 S.Ct. 387, 61 L.Ed. 791; Oman v. United States, 10 Cir., 1952, 195 F.2d 710; Garcia v. Sumrall, 1942, 58 Ariz. 526, 121 P.2d 640.
>
> "It is also beyond question that 'the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession

and to prosecute trespassers.' Camfield v. United States, 1897, 167 U.S. 518, 524, 17 S.Ct. 864, 866, 42 L.Ed. 260." United States v. West, 232 F.2d 694, 698 (9th Cir. 1956).

"While the lands in question are all within the State of Colorado, the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. *It may deal with such lands precisely as a private individual may deal with his farming property.* It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to pre-emption or homestead settlement; but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market. It needs no argument to show that the building of fences upon public lands with intent to enclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the Government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the Government as a landed proprietor." Camfield v. United States, 167 U.S. 518, 524, 17 S.Ct. 864, 866, 42 L.Ed. 260 (1897). (Emphasis supplied.)

"In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, § 8, of the Constitution, but also from Art. IV, § 3, relating to the management and disposal of federal property. As this Court said in United States v. San Francisco, 310 U.S. 16, 29-30, 60 S.Ct. 749, 84 L.Ed. 1050, 1059, 1060 (1940), *this 'power over*

the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." ' See also United States v. California, 332 U.S. 19, 27, 67 S.Ct. 1658, 91 L.Ed. 1889, 1893 (1947), and Alabama v. Texas, 347 U.S. 272, 273-274, 74 S.Ct. 481, 98 L.Ed. 689, 693, 694 (1954).

"Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. See Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), and Federal Power Com. v. Idaho Power Co., 344 U.S. 17, 73 S.Ct. 85, 97 L.Ed. 15 (1952)." Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 294, 295, 78 S.Ct. 1174, 1185, 2 L.Ed.2d 1313 (1958). (Emphasis supplied.)

"Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy." United States v. San Francisco, 310 U.S. 16, 29, 30, 60 S.Ct. 749, 756, 84 L.Ed. 1050 (1940).

Thus it would seem clear that the United States Government and its custodian, General Services Administration, could make use of its property as could any private citizen with his home. Hence, it could prevent entry or make such conditions as it deemed proper as a precedent to entry.

Once the United States had located offices and courts in its property and issued invitations for the public to enter, has it completely given up its right to protect itself, i.e., its property and employees? Stated in another way, may the government make the right of entry on its property conditional, i.e., on a casual visual inspection of packages, etc.? Reduced to an absurdity, is the United States helpless in protecting its property once it has been opened for the public use?

Since historically the right of the United States to regulate the use of its property has been accepted, there is a dearth of judicial precedents. However, by analogy we have the immigration border search cases, which have been universally upheld.[1] In addition, there are the military installation and naval base cases. For example, the concept of these cases is that the Constitution conferred on the President the power of Commander-in-Chief and it conferred on Congress the right to maintain a navy. In addition, Congress has the power to regulate and the President approves the regulations. Again keeping in mind that we are discussing property owned by the United States and not property owned by a private citizen, the cases are uniform in that: (1) regulations, much more stringent than those in the instant case, are reasonable; and (2) the power of the commanding officer under such regulation is supreme "in light of the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command." Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961).

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[1]77 Yale L.J. 1007, et seq.

> "Moreover, the governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment. See People v. Crane, 214 N.Y. 154, 167-169, 108 N.E. 427, 431-432, L.R.A.1916D, 550 (per Cardozo, J.); cf. Perkins v. Lukens Steel Co., 310 U.S. 113, 129, 60 S.Ct. 869, 84 L.Ed. 1108, 1115. In that proprietary military capacity, the Federal Government, as has been pointed out, has traditionally exercised unfettered control." Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961).

Of further interest is the holding in Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966), involving a trespass statute of the state of Florida. Certain protesting students had gone to the county jail to demonstrate against alleged discrimination. After refusal to depart, they were arrested and convicted of trespass. In the appeal to the United States Supreme Court, they asserted that their conviction denied them "rights of free speech, assembly, petition, due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States." Adderley v. Florida, *supra*, at 41, 87 S.Ct. at 244.

In deciding this case, the Court pointed out that traditionally, state capitol grounds are open to the public, but that jails built for security purposes are not.

It would seem elementary that a citizen who had legitimate business in a jail, i.e., a lawyer visiting a client, could gain access to it so long as he obeyed rea-

sonable rules and regulations. Certainly an attorney could not insist on taking into the jail with him uninspected packages, concealed weapons and explosives.

We quote from *Adderley* as follows:

> "For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate * * *.' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, Cox v. Louisiana, supra, 379 U.S. [536] at 554-555 and 563-564, 85 S.Ct. [453] at 464 and 480, 13 L.Ed.2d [471] at 484 and 491, 492. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." Adderley v. Florida, 385 U.S. 39, 47, 48, 87 S.Ct. 242, 247, 17 L.Ed.2d 149 (1966).

It is the opinion of this Court that the United States as a property owner can control entrance to its property by conditioning the entrant's right of entry on his submitting his packages and briefcase to a visual inspection.

Constitutional Issues.

Assuming, however, that the United States does not have this property right, would such casual visual inspection under the present G.S.A. procedures infringe any

constitutional rights of the entrant? If so, would the protection of any interest in the general welfare outweigh the infringement upon the individual's constitutional rights?

It should be noted at the outset that (1) the entrant has prior notice of the intended inspection, and (2) the entrant has three options, i.e., permit the inspection, deposit his briefcase for safekeeping, or permit a guard to accompany him to his destination.

The guards are unobtrusive and the inspection lacks the quality of insult felt by an individual in his own home or on the public street who is stopped and searched. When the interest in protection of the government property and personnel from destruction is balanced against any invasion to the entrant's personal dignity, privacy, and constitutional rights, the government's substantial interest in conducting the cursory inspection outweighs the personal inconvenience suffered by the individual. Furthermore, the persons whose packages are inspected generally fall within a morally neutral class. Because everyone carrying the enumerated parcels is required to have them inspected, the inspection is not accusatory in nature and the degree of insult to the entrant's dignity is minimal. Thus it cannot be said that a finger of suspicion is unfairly or arbitrarily being pointed at an individual as falling within a "highly selective or inherently suspect" group. See California v. Byers, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971).

The Fourth Amendment to the Constitution prohibits "unreasonable searches." But does it prohibit the government from conducting in its buildings casual eye inspections of an individual entrant's packages or briefcases to determine if guns or explosives are present?

Can this inspection in light of the interest it seeks to protect be so offensive, or overly broad so as to offend the guarantees of the Fourth Amendment and constitute an "unreasonable" search? This Court thinks not.

The alleged violations of the First Amendment are determined by the holding of the Supreme Court in the case of Adderley v. Florida, *supra.* Thus this Court feels no further discussion is necessary on this contention.

The inspection of the packages and briefcases does not violate the right against self-incrimination secured by the Fifth Amendment. The attorney-client privilege is not violated because the inspection is cursory in nature and the contents of the parcels are not read. In addition, where the entrant is given the three options mentioned above, under two of the options he can effectively circumvent consenting to even opening his packages under the guise of inspection.

The plaintiffs also assert that the Sixth Amendment is violated since they have been appointed counsel for defendants charged with a crime. They assert that the visual inspection of packages and briefcases for firearms and explosives is an infringement of this right. It is true that a defendant is guaranteed counsel. However, the cursory inspection at issue here does not infringe upon effective representation of a client by counsel. No restriction on representation of a client or any prying into confidential matters is involved here.

Emphasis at trial was directed to the fact that the purses of women are not inspected, even though some of the purses are quite large. Since no purses (men's, women's, or children's) were inspected, this Court sees no discrimination involved. Certainly the restriction elim-

inating the search of a purse, personal to an individual, mitigates the intrusion rather than enhances it.

This Court is not required to and does not pass upon the admissibility of any evidence or violations of the law by reason of the inspection in any subsequent criminal prosecution.

The Court, in light of the aforementioned options, does not feel compelled to determine whether the plaintiffs gave uncoerced consent to the casual visual inspection of their packages and briefcases.

Since the Court finds that the most serious questions were presented in the cases of the plaintiffs' attorneys, the opinion is so phrased. However, the principles announced have equal application to all the plaintiffs and are dispositive of their claims.

For the foregoing reasons, the request for injunction is denied and the case is dismissed.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 71-1898

GEORGE E. BARRETT, LIONEL R. BARRETT, JR., CARLTON H. PETWAY, RITA SANDERS GEIER and OMER GALLE, for themselves and jointly and severally for all others similarly situated,

Appellants,

v.

ROBERT KUNZIG, as Administrator of the General Services Administration; ED JOLLY as Area Manager, General Services Administration; HERMAN THOMPSON, as Acting Supervisor, General Services Administration; and JOHN SPRINKLE, Building Manager, General Services Administration, and all of their successors, agents, servants, employees and those persons in active concert or participation with them,

Appellees.

Before: Miller and Kent, Circuit Judges, and O'Sullivan, Senior Circuit Judge.

This action involves the validity of safety measures adopted by the General Services Administration for the protection of the Federal Building in Nashville, which houses a large number of judicial officers and other government personnel, as well as for the protection of all persons entering the said building.

The principal issue on appeal is whether the rights of persons, including attorneys, were violated when they were required to submit their briefcases and other packages for a cursory examination or inspection upon entering the building. The factual background is substantially the same as that set forth in our opinion *George L. Downing and William H. Merrill v. Robert Kunzig*, No. 71-1493, filed February 7, 1972, and we are of the opinion that *Downing* controls the disposition of the present appeal. We are of the view that the security precautions promulgated by G.S.A. and implemented with respect to the Federal Building in Nashville were reasonable[1] and that they do not infringe upon any constitutional rights of the plaintiffs under the Fourth Amendment or otherwise.

It is therefore ORDERED and ADJUDGED that the judgments of the district court dismissing the plaintiffs' actions be and they are hereby affirmed.

ENTERED BY ORDER OF THE COURT.

s/ JAMES A. HIGGINS
Clerk

Filed: February 22, 1972.

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[1]The fact that it was later decided by G.S.A., through its regional office in Atlanta, to exempt ladies' handbags and purses from the requirement of inspection or examination is not sufficient, in the light of the entire record, to show that the safety rules were unreasonable or arbitrary.

GEORGE L. DOWNING,
Plaintiff-Appellant,

WILLIAM H. MERRILL,
Plaintiff-Appellant,

v.

ROBERT L. KUNZIG,
Defendant-Appellee.

No. 71-1493.

United States Court of Appeals,
Sixth Circuit.
Feb. 7, 1972.

Before MILLER and KENT, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WILLIAM E. MILLER, Circuit Judge.

The General Services Administration, by authority of 40 U.S.C. Sec. 318a and 318b, is vested with the power to promulgate all needful rules and regulations for the government of federal property under its charge and control. One such rule provides that "no person while on property shall carry firearms, or other dangerous or deadly weapons, or explosives, either openly or concealed, except for official purposes." [Title 41, Code of Federal Regulations, Sec. 101-19.311]. Because of an outburst of acts of violence, bombings of federal buildings and hundreds of bomb threats, resulting in massive evacuations of federal property, and direct financial loss to the Government,[1] GSA in the fall of 1970 is-

[1]These facts are established by the records of GSA as shown by the affidavit of A. F. Simpson, Commissioner, Public Buildings Service, General Services Administration. This affidavit is challenged by plaintiff on appeal for the first time. The objection

sued to all of its Regional Administrators across the country supplementary instructions directing that immediate measures be adopted at federal facilities within their areas for the protection of federal property and personnel. Specific steps included the use of additional guards and patrols, the identification of persons entering federal buildings, and the denial of entrance to persons carrying suspicious packages unless they should voluntarily submit such packages for examination. By GSA's message of October 15, 1970 it was specifically directed:

> Information copy: All regional directors, PBS because of the recent outburst of bombings and other acts of violence, effective at once, at all entrances to federal property under the charge and control of GSA, where there are guards on duty, all packages shall be inspected for bombs or other potentially harmful devices. Admittance should be denied to anyone who refuses to voluntarily submit packages for examination.

These measures were in effect on December 7, 1970 when plaintiff, George L. Downing, a practicing attorney in Detroit, entered the Federal Building in that city, briefcase in hand, enroute to a hearing in one of the district courtrooms. He was stopped by a guard and advised that because of the rules then in effect he could not proceed above the first floor unless he either submitted his briefcase for inspection or left it behind until his re-

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is based on technical grounds and we think that it comes too late at this stage of the proceeding. Moreover, aside from the affidavit, we take judicial notice of violent outbreaks across the country and the consequent dangers and hazards to public property and the Government's officers and employees. Indeed, judicial notice may be taken of facts indicating that the threat is even more serious than the Simpson affidavit would indicate.

turn from court. Upon his refusal to do either he left the building without attending court. Soon thereafter plaintiff instituted the present action in the court below seeking a declaration that the acts complained of resulting in the demand that his briefcase be submitted for a search, and the GSA rules and regulations authorizing such procedure, are unconstitutional and void in that they require or direct an illegal search without a warrant and without probable cause in violation of the Fourth Amendment. The district court sustained the defendant's motion to dismiss the action.[2] In describing the procedure followed in Detroit under the applicable GSA regulations and directives, the trial court found:

> By nature of the guard's placement, all persons entering the Federal Building located in Detroit pass by these officers, and those individuals who carry brief cases, packages, etc., are requested to submit to a cursory inspection in order to ascertain whether they are attempting to conceal explosives or dangerous weapons that might cause personal injury or damage to property. Those persons who refuse to submit to a brief search of the articles they carry are not permitted to transport the articles into other portions of the building. Because of the numerous attorneys who daily transact business in the eleven Federal District Courts located within the building, a procedure has subse-

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[2]Although the district judge in terms disposed of the case by sustaining the defendant's motion to dismiss, we construe his opinion as having assumed that the case was before him as upon a motion for summary judgment, since he made findings on the basis of the pleadings (complaint and amended complaint and motion to dismiss) and affidavits filed by both parties. This practice is expressly authorized by Rule 12(b) of the Federal Rules of Civil Procedure.

quently developed whereby lawyers need only show their Detroit Bar Association membership card to gain unrestricted entrance to the building's premises. Federal employees of the building have also been issued identification cards which permit them unhampered access to their work areas.

The court's conception of the plaintiff's contention was delineated in its opinion as follows:

> Simply stated, it is plaintiff's contention that his right to be protected against any unreasonable searches and seizures of his papers and effects as guaranteed by the Fourth Amendment of the United States Constitution has been, and will continue to be, violated by the previously described rules and procedures. Plaintiff states, "that the interference by defendant and his agents with the plaintiff's free access to the courts without submitting to an unconstitutional and unreasonable search in violation of plaintiff's rights and in violation of the rights of plaintiff's clients to the security of confidential communications threatens to interfere with the plaintiff's earning of the livelihood and with the substantial business of plaintiff's clients."

It is clear that the practice of federal officers in Detroit charged with responsibility to enforce the GSA regulations in no way involved an examination of the personal papers of plaintiff or others entering the Federal Building to learn their contents nor any undue restraint against entry into the building. Assuming that a "search" in the Fourth Amendment sense was actually intended or involved, it must be conceded that it was cursory in nature and made for the strictly limited purpose of determining that no explosives or dangerous weapons were transported into the building.

We cannot agree that such "searches," (if they may be so characterized) made under the authority of GSA regulations were "unreasonable" under the Fourth Amendment. As clearly demonstrated by the facts of this case, the threat to federal property as well as to the safety of federal personnel performing essential functions of Government was direct and immediate and likely to materialize into acts of violence and destruction in any part of the nation. For the responsible governmental agency to have failed to act when confronted with such a situation could have resulted in a widespread disruption of the processes of government.

The reasonableness of a search under the Fourth Amendment and the question of whether a particular search requires a warrant must depend upon the facts in each case. Here, as stated, the dangers to federal property and personnel were imminent. The Federal Building in Detroit is one of significant importance. It is a ten-story building, housing eleven federal district courts, the offices of congressional and senatorial representatives, the chambers of two members of the Sixth Circuit Court of Appeals, and numerous other federal agencies. Ordinarily of course a person should not have his person or property subjected to a search in the absence of a warrant or probable cause to believe that a crime is being committed. Yet to relax the strictness of this rule in the special circumstances shown to exist in this case can in our view have no undermining effect on the protections afforded by the Fourth Amendment. As in most instances under the law competing values must be weighed and a balance struck. Here it seems to us that the balance is clearly on the side of upholding the very limited sort of search contemplated by the GSA

regulations and actually conducted by federal guards. In the first place, federal buildings housing federal courts and other governmental agencies are designed to be used strictly for governmental purposes. Although members of the public ordinarily have free access to such buildings, principally in connection with some business of their own, responsible agencies are free to adopt and enforce reasonable rules restricting such public use, such as on holidays and outside certain prescribed hours of the day.[3] Similarly, the manner and times of use may be regulated with respect to regular governmental officers and employees.

It is only a short step further to say that in times of emergency government may take reasonable steps to assure that its property and personnel are protected against damage, injury or destruction by resorting to the very minimal type of interference with personal freedom arising from the acts complained of in this case. The "searches" considered here involve no confiscation of legitimate property, no personal inspection of confidential papers, and no undue restraint on freedom of movement. The only intrusion is a brief stop and a cursory examination of packages or briefcases to determine the possible existence of articles having a potential of danger. In our view, the regulations and acts challenged in this case, in light of the factual background and the dangers confronting the Government, were both reasonable and fair. To require that an officer obtain a warrant to examine the packages of each of the hun-

[3]See United States v. Cassiagnol, 420 F.2d 868 (C.A.4 1970), cert. denied 397 U.S. 1044, 90 S.Ct. 1364, 25 L.Ed.2d 654, and In re Trials of Pending and Future Cases, 306 F.Supp. 333 (N.D.Ill.1969).

dreds of persons entering the building or determine as to each person the existence of probable cause would as a practical matter seriously impair the power of government to protect itself against ruthless forces bent upon its destruction. We find here no violation of the Fourth Amendment and no unconstitutional infringement upon the plaintiff's rights.

Affirmed.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23(a) and (b)

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecuton of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

CODE OF FEDERAL REGULATIONS

41 C.F.R. 101 - 19.3 (Now 41 C.F.R. §§ 101 - 303 and 101 - 311)

5. *Conformity with Signs and Emergency Directions.*

Persons in and on property shall comply with official signs of a prohibitory or directory nature, and, during emergencies, with the direction of authorized individuals.

14. *Weapons and Explosives.* No person while on property shall carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, except for official purposes.

GENERAL SERVICES ADMINISTRATION.
INSTRUCTIONS FOR INSPECTION.

Portion of a letter dated May 27, 1971, from John E. Sprinkle, Buildings Manager, to Heads of Tenant Agencies, U. S. Courthouse, Nashville, Tennessee. [Plaintiffs' exhibit No. 3]

> On June 15, 1971, we will require all persons to show ID cards to enter the building after duty hours. Also, all packages, briefcases, etc. will be opened for inspection on the same date. This does not include ladies' handbags.
>
> During hours when the building is open (7 a.m. to 5 p.m.), persons entering the building with briefcases, packages, etc. will be required to show ID cards or have their packages inspected.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE E. BARRETT, et al.,
Appellants,

v.

ROBERT KUNZIG, et. al.,
Appellees.

ORDER

No. 71-1898

BEFORE: MILLER and KENT, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

In this action a petition for rehearing and suggestion for rehearing en banc having been filed, and the Court having given full consideration thereto, is of the opinion that the said petition and suggestion are without merit.

It is therefore ORDERED that the petition for rehearing and suggestion for rehearing en banc are hereby denied.

ENTERED BY ORDER OF THE COURT.

s/ JAMES A. HIGGINS
Clerk

Filed: April 14, 1972